a

MALAYSIA BUILDING SOCIETY BHD

v.

TAN SRI GENERAL UNGKU NAZARUDDIN UNGKU MOHAMED

b

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W03-18-1996]
13 JANUARY 1998

c

BANKRUPTCY: *Jurisdiction - High Court - Whether has power to award damages upon annulment of adjudicating order and rescission of receiving order - Bankruptcy Act 1967, s. 105 - Courts of Judicature Act 1964, s. 24(c)*

d

TORT: *Abuse of process - Essential elements - Initiation - Dominant purpose - Collateral - Damage*

The appellant had obtained judgment in a civil suit for a sum exceeding RM1 million in default of appearance by the respondent. Later, acting on the judgment, the appellant, as petitioning creditor, instituted bankruptcy
e proceedings against the respondent which culminated in the making of receiving and adjudicating orders. The respondent took out a motion to set aside those orders. The respondent also asked for other relief, including damages. The learned judge who heard the respondent's motion annulled the adjudicating order, rescinded the receiving order, and directed that damages
f be paid by the appellant to the respondent. No appeal was made against this order.

The assessment of damages took place before the Senior Assistant Registrar of the High Court. The appellant argued that only nominal damages should be given. It was not argued until then that the order for damages had been
g made without jurisdiction. The registrar assessed damages at more than RM2 million to be paid by the appellant to the respondent. The appellant and the respondent appealed to the judge in chambers, the appellant complaining that the award was excessive and the respondent complaining that it was inadequate.

h

Pending the appeal, the appellant filed a summons-in-chambers to set aside the order that awarded damages to the respondent on the ground that the judge had no jurisdiction to make that order. The summons was dismissed by the learned judicial commissioner. The appellant appealed against that decision and

i

argued before the instant court: (i) that the receiving and adjudicating orders were made by the High Court in the exercise of its bankruptcy jurisdiction. So too were the orders whereby the receiving order was rescinded and the adjudicating order annulled; and (ii) that the power or jurisdiction of the High Court to rescind a receiving order and annul an adjudicating order is contained in s. 105 of the Bankruptcy Act 1967 ('the BA'). Section 105 of the BA is a complete code. It confers no power on a High Court exercising bankruptcy jurisdiction to summarily direct an assessment of damages.

The respondent in opposing the appeal argued: (i) that the order which annulled the adjudicating order and rescinded the receiving order was no doubt made in the exercise of the court's bankruptcy jurisdiction. However, the order which awarded damages to be assessed was not made under the bankruptcy jurisdiction but under the general civil jurisdiction seised of by the High Court; (ii) that there was ample jurisdiction in the judge to make the order for damages. Because of ss. 23 and 24 of the Courts of Judicature Act 1964 ('the CJA'), the learned judge sat not only in bankruptcy but also in general civil jurisdiction; (iii) that at best, the only complaint that might have been made by the appellant was that there was no judgment pursuant to which the assessment was directed. However, this was a mere irregularity not going to jurisdiction; and (iv) that the appellant had by its conduct waived the irregularity by participating in the inquiry as to damages and by failing to raise any objection at any stage as to the validity of the order. If the appellant was dissatisfied with that part of the order now complained of, it ought to have preferred an appeal.

Held:
Per Gopal Sri Ram JCA

[1] Section 24(c) of the CJA 1964 confers bankruptcy jurisdiction upon the High Court. However, the powers that it may exercise under that jurisdiction must be discovered in the specific legislation enacted by Parliament upon the subject. Thus, its powers in relation to the rescinding and annulment of receiving and adjudicating orders respectively, are to be found in s. 105 of the BA.

[1a] Section 105 of the BA is a complete code within the framework of which must be found all the powers exercisable by the High Court in bankruptcy jurisdiction when considering an application to discharge adjudicating and receiving orders. It cannot make any other orders.

[2] The High Court lacks the power to make a summary award of damages to be assessed upon making orders under s. 105 of the BA. The acquiescence on the part of the appellant could not confer power where non existed.

[3] The respondent had obtained damages without proving a single element of the tort of collateral abuse of process, the essential elements of which are: (i) the process complained of must have been initiated; (ii) the purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and (iii) the plaintiff must have suffered some damage or injury in consequence.

[Appeal allowed; order of judicial commissioner set aside.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Penghakiman sejumlah melebihi RM1 juta diberikan untuk perayu di dalam kes sivil apabila responden tidak menghadirkan diri di mahkamah. Berdasarkan penghakiman tersebut, perayu yang bertindak sebagai pemiutang pempetisyen telah memulakan prosiding kebankrapan terhadap responden yang mengakibatkan perintah-perintah penerimaan dan adjudikasi dikeluarkan. Responden mengemukakan usul untuk mengenepikan perintah-perintah tersebut. Responden turut memohon relief yang lain, termasuklah gantirugi. Hakim yang bijaksana yang mendengar usul responden, memansuhkan perintah adjudikasi, membatalkan perintah penerimaan dan mengarahkan supaya gantirugi dibayar oleh perayu kepada responden. Tiada rayuan dibuat terhadap perintah ini.

Penaksiran gantirugi dilakukan oleh Penolong Pendaftar Kanan Mahkamah Tinggi. Perayu menghujahkan bahawa hanya gantirugi nominal patut diberikan. Tidak dihujahkan pada mana-mana peringkat sehinggalah kemudiannya bahawa perintah pembayaran gantirugi telah dibuat tanpa bidangkuasa. Pendaftar menaksir gantirugi melebihi RM2 juta yang perlu dibayar oleh perayu kepada responden. Perayu dan responden membuat rayuan kepada hakim dalam kamar, perayu mengatakan bahawa award itu adalah terlalu banyak manakala responden pula mengatakan bahawa award itu adalah tidak mencukupi.

Sementara menunggu rayuan itu diputuskan, perayu memfailkan saman dalam kamar untuk mengenepikan perintah pembayaran gantirugi kepada responden atas alasan bahawa hakim tersebut tidak mempunyai bidangkuasa untuk membuat perintah itu. Saman tersebut ditolak oleh pesuruhjaya kehakiman yang

bijaksana. Perayu merayu terhadap keputusan itu dan menghujahkan di mahkamah sekarang: (i) bahawa perintah-perintah penerimaan dan adjudikasi dibuat oleh Mahkamah Tinggi semasa menjalankan bidangkuasa kebankrapannya. Begitu juga dengan perintah-perintah di mana perintah penerimaan dibatalkan dan perintah adjudikasi dimansuhkan; (ii) bahawa kuasa atau bidangkuasa Mahkamah Tinggi untuk membatalkan perintah penerimaan dan untuk memansuhkan perintah adjudikasi adalah terkandung di dalam s. 105 Akta Kebankrapan 1967. Seksyen 105 adalah kod yang lengkap. Ia tidak memberikan kuasa kepada Mahkamah Tinggi yang menjalankan bidangkuasa kebankrapan untuk mengarahkan secara terus penaksiran gantirugi untuk responden.

Responden yang membangkang rayuan tersebut menghujahkan: (i) bahawa perintah yang memansuhkan perintah adjudikasi dan yang membatalkan perintah penerimaan adalah secara tidak syak lagi dibuat semasa menjalankan bidangkuasa kebankrapan. Walau bagaimana pun, perintah yang mengarahkan supaya gantirugi ditaksirkan tidak dibuat di bawah bidangkuasa kebankrapan tetapi dibuat di bawah bidangkuasa am sivil yang dimiliki oleh Mahkamah Tinggi; (ii) bahawa terdapat bidangkuasa yang mencukupi untuk hakim tersebut membuat perintah bagi gantirugi. Oleh kerana ss. 23 dan 24 Akta Mahkamah Kehakiman 1964, hakim yang bijaksana bukan sahaja bersidang di dalam bidangkuasa kebankrapan malah juga di dalam bidangkuasa sivil yang am; (iii) bahawa paling tidak pun, satu-satunya aduan yang mungkin boleh dibuat oleh perayu adalah bahawa tiada penghakiman dibuat berkaitan penaksiran yang diarahkan. Walau bagaimana pun, ini hanyalah luar aturan yang tidak menyentuh bidangkuasa; (iv) bahawa perayu berdasarkan tindak-tanduknya, telah mengenepikan luar aturan tersebut dengan mengambil bahagian di dalam siasatan berkaitan gantirugi dan dengan tidak mengemukakan sebarang bantahan pada mana-mana peringkat tentang keesahan perintah tersebut. Jika perayu sekarang tidak berpuashati dengan perintah yang diadukan itu, ia sepatutnya telah mengemukakan rayuan.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Seksyen 24(c) Akta Mahkamah Kehakiman 1964 memberikan bidangkuasa kebankrapan kepada Mahkamah Tinggi. Walau bagaimana pun kuasa yang boleh dijalankan oleh Mahkamah Tinggi di bawah bidangkuasa tersebut hendaklah diperolehi daripada perundangan khusus yang digubal oleh Parlimen berkaitan perkara tersebut. Oleh itu, kuasa Mahkamah Tinggi di dalam membatalkan perintah penerimaan dan di dalam memansuhkan perintah adjudikasi adalah terkandung di dalam s. 105 Akta Kebankrapan 1967.

[1a] Seksyen 105 adalah kod yang lengkap yang mana di dalam ruang lingkupnya terkandung kesemua kuasa yang boleh dijalankan oleh Mahkamah Tinggi semasa menjalankan bidangkuasa kebankrapan dalam mempertimbangkan permohonan untuk membatalkan perintah-perintah adjudikasi dan penerimaan. Mahkamah tidak boleh membuat mana-mana perintah yang lain.

[2] Mahkamah Tinggi tidak mempunyai kuasa untuk secara terus membuat award penaksiran gantirugi sebaik sahaja membuat perintah-perintah di bawah s. 105. Akuiesens di pihak perayu tidak boleh memberikan kuasa bila mana tiada kuasa yang wujud.

[3] Responden mendapat gantirugi tanpa membuktikan sebarang elemen tort penyalahgunaan kuasa kolateral yang mana elemen-elemen pentingnya adalah: (i) proses yang diadukan itu mestilah telah dimulakan; (ii) tujuan proses itu dimulakan mestilah untuk tujuan selain daripada mendapat tebus rugi sejati yang diperuntukkan oleh proses tersebut. Dalam lain perkataan, tujuan dominan proses itu digunakan mestilah kolateral, iaitu, bertujuan untuk menghasilkan keputusan yang bukan diniatkan daripada penggunaan proses tersebut; (iii) akibatnya plaintif mestilah telah mengalami kebinasaan atau kecederaan.

[Rayuan dibenarkan; perintah pesuruhjaya kehakiman diketepikan.]

Cases referred to:

Badiaddin Mohd Mahidin & Anor v. Arab-Malaysian Finance Berhad [1998] 2 CLJ 75 ***(cit)***

Cameron v. Cole [1943] 68 CLR 571 ***(foll)***

Ellis v. Silber LR 8 Ch App 83 ***(cit)***

Ex parte Reynolds 15 QBD 169 ***(cit)***

Goldsmith v. Sperrings [1977] 1 WLR 478 ***(aff)***

Grainger v. Hill [1838] 4 Bing (NC) 212 ***(aff)***

In re Majory [1955] Ch 600 ***(refd)***

Jones v. Pritchard [1849] 6 Dow & L 529 ***(refd)***

Lee Lee Cheng v. Seow Peng Kwang [1960] MLJ 1 ***(refd)***

Macdougall v. Knight [1890] 25 QBD 1 ***(refd)***

Re Hutton [1969] 1 All ER 936 ***(cit)***

Re Thomas [1984] 1 WLR 232 ***(cit)***

Williams v. Spautz 107 ALR 635 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 91(1), 105

Courts of Judicature Act 1964, ss. 23, 24

Other source referred to:
William's on Bankruptcy, 13th edn

[Appeal from High Court, Kuala Lumpur; Bankruptcy No: 644-1985]

[Editor's note: For a recent case on abuse of process, please see also Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors [1996] 3 CLJ 695; [1996] CLJ JT(22).]

For the appellant - Dr CV Das (John Matthew & Jayanthi Pillai with him); M/s Kadir, Tan & Ramli
For the respondent - B Thangaraj; M/s Thangaraj & Assoc

Reported by Hjh Siti Faridah

JUDGMENT

Gopal Sri Ram JCA:

This appeal raises a point of importance touching upon jurisdiction of the High Court in bankruptcy proceedings. At issue is the question whether, upon annulment of an adjudicating order and rescission of a receiving order, a High Court in bankruptcy has power summarily to direct an assessment of damages in favour of the debtor. The matter arose in this way.

On 3 April 1984, the appellant before us obtained judgment in Civil Suit C431 of 1984 for the sum of RM1,475,529.68. It was a judgment in default of appearance. Later, on 4 April 1986, acting on the judgment, the appellant, as petitioning creditor instituted bankruptcy proceedings against the respondent which culminated in the making of receiving and adjudicating orders on 10 March 1986.

On 20 October 1987, the respondent took out a motion to set aside these orders. He also asked for other relief, including an order that "damages be paid by the petitioning creditor to the debtor". On 19 June 1992, the learned judge who heard the respondent's motion granted an order in its terms. Apart from annulling the adjudicating order and rescinding the receiving order, he directed that damages be paid by the appellant to the respondent. No appeal was preferred against this order, which was made *inter partes* in the presence of counsel for the appellant and after hearing argument. The appellant's solicitors approved the draft order submitted to them which contained the direction as to the payment of damages.

On 23 March 1995, the respondent's solicitors wrote to the Senior Assistant Registrar of the High Court requesting for a date on which the inquiry as to damages was to be held. A date was assigned and after several adjournments, the assessment took place over a number of days before the registrar. *Viva*

voce evidence was led and written submissions were put in. The appellant in its written submission merely argued that only nominal damages should be given. It was not argued at any stage until then that the order for damages had been made without jurisdiction. On 22 May 1995 the Senior Assistant Registrar assessed damages at RM2,166,275 to be paid by the appellant to the respondent. Each side preferred an appeal to the judge in chambers, the appellant complaining that the award was excessive and the respondent complaining that it was inadequate. Counsel has informed us that these appeals are pending before the High Court awaiting a decision of this court in the present appeal.

On 10 July 1995 the appellant filed a summons-in-chambers to set aside that part of the order dated 19 June 1992 that awarded damages to the respondent. The ground upon which the application was made was that the judge had no jurisdiction to make that order. The appellant's summons was heard before the learned judicial commissioner who, after hearing arguments, dismissed it on 2 March 1996. It is against that decision that the present appeal has been brought.

When the appeal was called on yesterday, we formed the preliminary view that the High Court lacked the power to do what it did, namely to make a summary award of damages to be assessed. We therefore invited Mr. B. Thangaraj of counsel for the respondent to address us first and have heard him yesterday and this morning. We then invited Mr. Das of counsel for the appellant to present his arguments and afforded Mr. Thangaraj an opportunity for further response. Mr. Das' arguments in support of the appeal may, I think, be summarised as follows:

1. The receiving and adjudicating orders dated 10 March 1986 were made by the High Court in exercise of its bankruptcy jurisdiction. So too were the orders made on 19 June 1992 whereby the receiving order was rescinded and the adjudicating order annulled.

2. The power or jurisdiction – and I use these two expressions interchangeably for present purposes – of the High Court to rescind a receiving order and annul an adjudicating order is contained in s. 105 of the Bankruptcy Act 1967 ('the Act'). Section 105 is a complete code. It confers no power on a High Court exercising bankruptcy jurisdiction to make the kind of order that was made in this case.

Mr. Thangaraj in opposing the Appeal has argued as follows:

1. There is no doubt that the order which annulled the adjudicating order and rescinded the receiving order was made in exercise of bankruptcy jurisdiction. However that part of the order which awarded damages to be assessed was not made under the bankruptcy jurisdiction but under the general civil jurisdiction seised of by the High Court.

2. There was ample jurisdiction in the judge to make the order for damages. Because of ss. 23 and 24 of the Courts of Judicature Act 1964, the learned judge sat not only in bankruptcy but also in general civil jurisdiction.

3. At best, the only complaint that might have been made by the appellant was that there was no judgment pursuant to which the assessment was directed. However, this is a mere irregularity not going to jurisdiction.

4. The appellant had by its conduct waived the irregularity by participating in the inquiry as to damages and by failing to raise any objection at any stage as to the validity of the order. If the appellant was dissatisfied with that part of the order now complained of, it ought to have preferred an appeal.

In order to appreciate these arguments, it is necessary to hearken to the statutory provisions upon which counsel have relied.

I begin with the Courts of Judicature Act 1964, ss. 23 and 24 of which reads as follows:

> 23(1) Subject to the limitation contained in Art. 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where –
>
> (a) the cause of action arose;
>
> (b) the defendant or one of several defendants resides or has his place of business;
>
> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
>
> (d) any land the ownership of which is disputed is situated,
>
> within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

(2) Without prejudice to the generality of sub-s. (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.

24 Without prejudice to the generality of s. 23 the civil jurisdiction of the High Court shall include –

(a) jurisdiction under any written law relating to divorce and matrimonial causes;

(b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981;

(c) jurisdiction under any written law relating to bankruptcy or to companies;

(d) jurisdiction to appoint and control guardians of infants and generally over the person and property of infants;

(e) jurisdiction to appoint and control guardians and keepers of the person and estates of idiots, mentally disordered persons and persons of unsound mind; and

(f) jurisdiction to grant probates of wills and testaments and letters of administration of the estates of deceased persons leaving property within the territorial jurisdiction of the Court and to alter or revoke such grants.

The relevant portion of the written law quoted above is s. 24(c) which confers bankruptcy jurisdiction upon the High Court. This is what is known as "subject-matter jurisdiction". In other words, s. 24(c) empowers the High Court to deal with the subject matter of bankruptcy. However the **powers** that it may exercise under that **jurisdiction** must be discovered in the specific legislation enacted by Parliament upon the subject.

That brings me to the Act, s. 105 of which reads as follows:-

105(1) Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the court may annul the adjudication.

(2) Where an adjudication is annulled under this section, all sales and dispositions of property, and payments duly made, and all acts theretofor done by the Official Assignee, or other person acting under his authority, or by the court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the court appoints, or in default of any such appointment revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the court declares by order.

(3) Notice of the order annulling an adjudication shall be forthwith gazetted and published in at least one local paper.

(4) For the purposes of this section any debt disputed by a debtor shall be considered as paid in full if the debtor enters into a bond, in such sum and with such sureties as the court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into court.

(5) When the court annuls an adjudication under this section it shall also rescind the receiving order.

It is clear from the foregoing provisions that while the High Court has subject-matter jurisdiction under s. 24(c) of the Courts of Judicature Act, its powers in relation to the rescinding and annulment of receiving and adjudicating orders respectively, are to be found in s. 105 alone.

Having considered the arguments advanced on both sides, I am not persuaded that the learned judge who made the order of 19 June 1992 was exercising two jurisdictions. I am convinced that he made all the orders of that date in the exercise of his bankruptcy jurisdiction. As I said at the commencement of this judgment, the issue is whether he is empowered to award damages in bankruptcy. There is, in my judgment, much force in the argument of Mr. Das that s. 105 of the Act is a complete code within the framework of which must be found all the powers exercisable by the High Court in bankruptcy jurisdiction when considering an application to discharge adjudicating and receiving orders. I find Mr. Das' submission to be supported by respectable authority.

In *Cameron v. Cole* [1943] 68 CLR 571, 583, Latham CJ when dealing with the equivalent Australian provision made the following observation:

> Where a composition or scheme of arrangement is approved by the Court, a sequestration order may be annulled (s. 71(18)). Apart from s. 71(18), s. 124 contains all the provisions of the Act relating to annulment of sequestration orders. Section 124 is a special provision relating to that subject. The power to annul a sequestration order is given separately from the power conferred by s. 26 to review, rescind or vary orders. Section 124, is, as Baldwin on *Bankruptcy and Bills of Sale*, 11th Edn. (1915), p. 717, says, with respect to the corresponding English section, "intended to be a complete code" on the subject of annulment of such orders (*In re Gyll; Ex parte Board of Trade* [1888] 58 LJQB 8; *In re Burnett; Ex parte Official Receiver* [1894] 63 LJQB 423; *Ex parte Painter; In re Painter* [1895] 1 QB 85; *In re Izod; Ex parte Official Receiver* [1898] 1 QB 241 – See also Williams on *Bankruptcy,* 15th ed. (1937), pp. 143, 144. The power to order a rehearing, derived from s. 26, is not the power which is exercised when the Court makes an order of annulment. There is no power to annul a valid sequestration order without observance of what have been described as "the very careful provisions" which are applicable in the case of an application to annul (*In re A Debtor; Ex parte Official Receiver* [1937] 106 LJ Ch. 225). When an order for sequestration is annulled the debtor, in respect of his property, is restored to the *status quo ante,* subject to any order which the Court may make under that sub-section (See per Cockburn CJ in *Bailey v. Johnson* [1872] LR 7 Ex., at p. 264) – he is remitted to his original situation. Section 124 authorises an order for annulment, but in my opinion does not authorise a new hearing of a petition, after an order of sequestration made thereon has been annulled under the section, as if the petition were still pending.

It is settled law that bankruptcy jurisdiction is statutory so that the powers of a bankruptcy court are to be discovered from within the terms of the relevant statute. See, *Re Thomas* [1984] 1 WLR 232; *Ex Parte Reynolds* 15 QBD 169 and *Ellis v. Silber* LR 8 Ch. App. 83.

Mr. Das has also argued that the position is made clearer by an examination of the jurisdictional history of the English bankruptcy court. He has drawn to our attention a passage from the 13th Edn of William's on *Bankruptcy* which reads as follows:

> Under the earlier statutes, the petitioning creditor, on striking the docket, had to give a bond to the Lord Chancellor conditioned for proving his debt and an act of bankruptcy, and to proceed on the commission, which bond might be assigned to the debtor petitioned against; and the statutes of 1849, s. 267, and 1861, s. 91 provided that the Court might order satisfaction to any person aggrieved, if the debt and act of bankruptcy were not proved, and if it appeared that the fiat, or petition, was issued or filed fraudulently or maliciously.

It is significant that the power exercisable by the English bankruptcy court earlier in its history as described in Williams in his work is absent in s. 105 of the Act.

I am therefore in agreement with Mr. Das' submission that there is absent in the High Court in our country, any power to award damages upon making orders under s. 105 of the Act. Put another way, a High Court exercising bankruptcy jurisdiction, under 105 of the Act may only make those orders referred to in the five sub-sections thereunder. It cannot make any other orders.

It is axiomatic that a court while having jurisdiction over a particular subject matter may lack power to make certain orders in respect of that subject matter. This dichotomy between jurisdiction and power is well brought out by the judgment of Thompson CJ (as he then was) in *Lee Lee Cheng v. Seow Peng Kwang* [1960] MLJ 1.

The authorities cited by Mr. Thangaraj in opposition to the view which I favour are, with respect, not relevant. They deal, in the main, with a discretion vested in a bankruptcy court to decide disputed questions of fact necessarily adjunct to the exercise of bankruptcy jurisdiction. See, for example, *Re Hutton* [1969] 1 All ER 936. Thus, if upon hearing a petition a question arises as to whether the debt is really owed, it is open to the High Court in the exercise of its bankruptcy jurisdiction, to determine that question, or to dismiss, or to stand over, the petition with a direction to the parties to resort to the ordinary civil jurisdiction of the court for the resolution of the dispute. That position is with respect to Mr. Thangaraj, worlds apart from the factual matrix that has arisen in the present appeal.

Section 91(1) of the Act, relied upon by Mr. Thangaraj, is also of no assistance to the respondent. That section which reads:

> 91(1) Subject to this Act, the court, under its jurisdiction in bankruptcy, shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the court, or which the court deems it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case

confers a very limited kind of jurisdiction upon a bankruptcy court. See, *Ellis v. Silber (supra)* and *Re Hutton (supra)*. In my judgment the section certainly does not empower that court to make the kind of order that was made in this case.

Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.

The position has been neatly summed up by Lord Denning MR in his dissenting judgment in *Goldsmith v. Sperrings* [1977] 1 WLR 478, where at p. 489 he said:

> In a civilised society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.

Though a dissenting judgment, the principle enunciated by the Master of the Rolls has been accepted as authoritative of what constitutes an abuse of process.

Sometime abuse can be shown by the very steps being taken in the courts. Take some instances from the law of libel. When a man sent a defamatory circular to seven different persons, and the party defamed brought seven different libel actions against the same defendant, one for each publication, all were stayed, save one, Erle J saying:

> [T]he plaintiff has not alleged that any purpose would be obtained by the course he has already adopted, beyond imposing the cost of litigation on the defendant.

See *Jones v. Pritchard* [1849] 6 Dow. & L. 529, 530.

Again, where a pamphlet contained two different passages, each defamatory of a man, he brought two separate actions, one for each passage. He failed on the first. The second was stayed, Fry LJ saying: "Such successive actions … would be an abuse of the process of the court …" See *Macdougall v. Knight* [1890] 25 QBD 1 at p. 10.

At other times the abuse can only be shown by extrinsic evidence that the legal process is being used for an improper purpose. On the face of it, in any particular case, the legal process may appear to be entirely proper and correct. What may make it wrongful is the purpose for which it is used. If it is done in order to exert pressure so as to achieve an end which is improper in itself, then it is a wrong known to the law. This appears distinctly from the case which founded this tort. It is *Grainger v. Hill* [1838] 4 Bing. (NC) 212; 132 ER 769, which arose out of the old process of capias. The plaintiff recovered damages for abuse of the process. It had been abused because it had been taken, as Tindall CJ said (at p. 221 of the report), "to effect an object not within the scope of process"; and as Bosanquet J said (at p. 224), "the process was enforced for an ulterior purpose".

The same principle is shown in many bankruptcy cases. It was well stated by Lord Evershed MR, delivering the judgment of the English Court of Appeal in *In re Majory* [1955] Ch. 600, 623:

> The so-called 'rule' in bankruptcy is, in truth, no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused.

Because it has been developed on a case by case basis as other common law wrongs have, the tort of abuse of process, since its entry into the law of torts, has undergone change through history. The essential elements of the tort in present day context have been set out in the instructive judgment of the High Court of Australia in *Williams v. Spautz* 107 ALR 635.

There are two passages in the judgment of the seven judges who heard that appeal which I think are worthy of reproduction here. The first is at p. 643 of the report and reads as follows:

> In elucidating the principles governing the exercise of the inherent jurisdiction, the courts have had regard to the tort of collateral abuse of process. This cause of action has been recognised in England (*Grainger v. Hill* [1838] 132 ER 769; *Gilding v. Eyre* [1861] 142 ER 584, and, more recently, *Speed Seal Products Ltd. v. Paddington* [1985] 1 WLR 1327, at 1334-5 and *Metall & Rohstoff v. Donaldson Lufkin & Jenrette Inc.* [1990] 1 QB 391, at 469), the United States (*Prough v. Entriken* [1849] 11 Pa. 81) and Canada (*Guildford Industries Ltd. v. Hankinson Services Ltd.* [1973] 40 DLR (3d) 398). It was recognised by this court in *Varawa v. Howard Smith Co Ltd* [1911] 13 CLR 35 and *Dowling v. Colonial Mutual Life Assurance Society Ltd* [1915] 20 CLR 509.

The tort of collateral abuse of process differs from the older action for malicious prosecution in that the plaintiff who sues for abuse of process need not show: (a) that the initial proceeding has terminated in his or her favour; and (b) want of reasonable and probable cause for institution of the initial proceeding *(Grainger v. Hill)*.

Central to the tort of abuse of process is the requirement that the party who has instituted proceedings has done so for a purpose or to effect an object beyond that which the legal process offers. The centrality of this element in the tort was recognised in the case which is generally recognised as having established the tort of abuse of process, *Grainger v. Hill*. In that case, the defendants lent money to Grainger in September 1836, secured by a mortgage on a ship. The money was to be repaid in September 1837. However, the defendants decided to seek possession of the ship's register before the loan was due to be repaid. When Grainger refused to repay the loan in response to the defendant's threat of arrest, they commenced an action in assumpsit in the King's Bench for recovery of the loan. A writ of capias was issued endorsed for bail pursuant to which the debtor arrested. When the writ was issued on the instructions of the defendants, the sheriff's officers who served the process on Grainger told him that they had come for the register and that, if he did not deliver it or find bail they would take him into custody. Grainger was imprisoned for 12 hours before he handed over the register. He then sued the defendants in a special action on the case. They sought a nonsuit, arguing that it had not been proved that the defendants' action had terminated and that Grainger had not alleged an absence of reasonable and probable cause. These arguments would have prevailed if Grainger's action had been for malicious prosecution or malicious arrest.

The court rejected the notion that the action was in essence an action for malicious prosecution or malicious arrest and held that it was a distinct and independent action for abuse of process. Tindal CJ said (at p. 773):

> If the course pursued by the defendants is such that there is no precedent of a similar transaction, the plaintiff's remedy is by an action on the case, applicable to such new and special circumstances; and his complaint being that the process of the law has been abused, *to effect an object not within the scope of the process,* it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause (emphasis added).

Bosanquet J said (at p. 774):

> This not an action of a malicious arrest or prosecution, or for maliciously doing that which the law allows to be done: the process was enforced for an ulterior purpose; to obtain property by duress to which the defendants had no right. The action is not for maliciously putting process in force, but for maliciously abusing the process of the court.

The second passage is at p. 646 of the report and reads:

> The observations of the Privy Council in *King v. Henderson* [1898] AC at 731 and those of Isaacs J in *Dowling,* to which we referred earlier, represent an attempt to achieve a formulation which keeps the concept of abuse of process within reasonable bounds. **To say that a purpose of a litigant in bringing proceedings which is not within the scope of the proceedings constitutes, without more, an abuse of process might unduly expand the concept.** The purpose of a litigant may be to bring the proceedings to a successful conclusion so as to take advantage of an entitlement or benefit which the law gives the litigant in that event.
>
> Thus, to take an example mentioned in argument, an alderman prosecutes another alderman who is a political opponent for failure to disclose a relevant pecuniary interest when voting to approve a contract, intending to secure the opponent's conviction so that he or she will then be disqualified from office as an alderman by reason of that conviction, pursuant to local government legislation regulating the holding of such office. The ultimate purpose of bringing about disqualification is not within the scope of the criminal process instituted by the prosecutor. But the immediate purpose of the prosecutor is within that scope. And the existence of the ultimate purpose cannot constitute an abuse of process when that purpose is to bring about a result for which the law provides in the event that the proceedings terminate in the prosecutor's favour.

It is otherwise when the purpose of bringing the proceedings is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed (*Re Majory* [1955] Ch. 600, at 623-4) or some collateral advantage beyond what the law offers (*Goldsmith v. Sperrings Ltd.* [1977] 1 WLR at 498-9; see also *Varawa* [1911] 13 CLR, at 91). So, in *Dowling,* Isaacs J pointed out that (at p. 524):

> … if, for instance, it had been shown that the Society had simply threatened Dowling that unless he did what they had no right to demand from him, namely, give up certain names, they would proceed to sequestration, and they had proceeded accordingly, there would have been in law an abuse of the process'.
>
> However, because the Society wished to use the process for the very purpose for which it was designed, there was no abuse of process. (Emphasis added.)

In my judgment the essential elements of the tort of abuse of process are these:

(1) The process complained of must have been initiated;

(2) The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process;

(3) The plaintiff must have suffered some damage or injury in consequence.

It is to be stressed that neither malice nor the termination of the proceedings in the plaintiff's favour are necessary elements of the tort. To put it plainly, a plaintiff in an action for abuse of process need not prove that the defendant had invoked the process of the court maliciously. Neither does he have to prove that the proceedings terminated in his favour.

It is only upon proof of the elements that go to make up the tort of collateral abuse of process, that a plaintiff is entitled to an award of damages. What has happened here is that the respondent short-circuited the methodology for obtaining relief. He has without proving a single element of the tort, obtained damages of more than RM2 million. I am unaware of any authorities, indeed none have been cited before us, that enables such a result to be intended by the law. To all this, Mr. Thangaraj argues that his client would be put to great hardship and will suffer severe prejudice. He says that his client is 75 years old and has already given evidence once and subjected to rigorous cross-examination. He should not be exposed to the hazards of another litigation.

My respectful response to that argument is that the respondent is the author of his own misfortune. Had he followed the correct steps available to him he would not find himself in this position.

Mr. Thangaraj's argument that there had been a mere irregularity waived by the appellant's conduct, is in my opinion without merit. The absence of a power to make orders is not a mere irregularity; it goes to one aspect of jurisdiction. I have often said and I repeat it here, that the word "jurisdiction" is an expression that must be very carefully used for it draws its colour from its context. In the present case, the High Court had no power to make the order granting damages to the respondent. The acquiescence on the part of the appellant cannot confer power where none exists. It is the same with jurisdiction. Neither consent nor waiver can confer jurisdiction where none exists. See *Badiaddin Bin Mohd Mahidin & Anor v. Arab-Malaysian Finance Berhad* (Federal Court Civil Appeal No. 02-4-1996, unreported).

After having carefully considered the arguments in this case and for the reasons already given, I am of the opinion that this appeal ought to succeed. The learned judicial commissioner was clearly wrong in refusing to entertain the application of the appellant to set aside that the portion of the order of 19 June 1992 directing that damages be paid by the appellant to the respondent.

Before I make the orders on the appeal I invite my learned sister and my learned brother to give their views.

Siti Norma Yaakob JCA:

I concur with the reasons given. I too would allow this appeal.

Denis Ong JCA:

I agree with the judgment of my learned brother.

Order

The appeal is hereby allowed. The Order of the judicial commissioner dated 2 March 1996 is set aside. There shall be an order in terms of the appellant's summons-in-chambers dated 10 July 1995 except for the prayer as to costs. There shall be no order as to costs of the appeal. The order as to costs in the court below shall stand. The deposit shall be refunded to the appellant.